IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.2622 OF 1995
ALONG WITH
WRIT PETITION NO.3683 OF 1995

WRIT PETITION NO.2622 OF 1995

N.M.Wadia Charitable Hospital)
Station Road, Solapur through its)
Chairman Dr.Mahavir C. Mehta.).. Petitioner

Versus

Dr.Ashok Vyankatesh Apate)
Adult, Occ.: Medical Practitioner)
residing of Usha Kunj, 560/3)
Housing Society Camp, Solapur.).. Respondent

Mr.G.S.Godbole for the Petitioner.

Ms.N.D.Buch with Ms.B.B.Dholakia for the Respondent.

ALONG WITH
WRIT PETITION NO.3683 OF 1995

Dr.Ashok Venkatesh Apate)
of Solapur Indian Inhabitant)
residing at Usha Kunj, 560/3)
Housing Society, Camp, Solapur.).. Petitioner

Versus

1) Shri V.T.Kore, Presiding Officer)
and Judge II Labour Court)
Solapur.)

2) Shri R.U.Ingule, Member)
Industrial Court, Solapur.)

3) N.M.Wadia Charitable Hospital)
a Charitable Trust having its)
office at Station Road, Solapur.).. Respondents

Ms.N.D.Buch with Ms.B.B.Dholakia for the Petitioner.

Mr.G.S.Godbole for Respondent No.3.

Respondent Nos.1 and 2 formal parties.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 23RD AUGUST 2004

ORAL JUDGMENT :

. Writ Petition No.2622 of 1995 has been filed by N.M.Wadia Charitable Hospital, Solapur (hereinafter referred to as the "Hospital") challenging the order dated 20th January 1995 passed by the Member, Industrial Court, Solapur in Revision (ULP) No.109 of 1993 filed by the Hospital as well as the order dated 18th November 1993 passed by the Judge, 2nd Labour Court, Solapur in Complaint (ULP) No.212 of 1987. The principle challenge in the Petition is that the Labour Court and the Industrial Court have erred in their judgments as a Doctor or Medical Practitioner is not a ‘workman’ as defined in Section 2(s) of the Industrial Disputes Act, 1947.

2. Writ Petition No.3683 of 1995 has been filed by the Doctor challenging the findings of the Labour Court that he was entitled to only 50% of back wages while granting reinstatement with continuity of service as well as the order of the Industrial Court in Revision.

3. Both these Petitions can be disposed of by a common judgment.

4. The facts in the present case are not disputed. The Petitioner in Writ Petition No.2622 of 1995 is a Charitable Hospital registered under the Bombay Public Trusts Act. The Respondent (hereinafter referred to as the "Doctor") in the said Writ Petition was appointed as a Doctor in the Hospital from 27th February 1981. In his appointment letter, he was informed that he would be paid a monthly salary of Rs.500/- consolidated in the time scale of Rs.400-20-600-40-800-EB-50-1000/-. Special allowance of Rs.100/- per month was to be paid to him. The hours of work which he was expected to work were set out. Provident Fund and gratuity were to be paid in accordance with the Employees Provident Fund & Miscellaneous Provisions Act and the Payment of Gratuity Act, respectively. One of the conditions in the appointment letter was that he could engage in private consulting practice without being attached to any Nursing Home or other institution. He was also informed that he would be paid increments regularly after being confirmed in service on completion of one year's service. Leave was also to be given in accordance with the Hospital rules. Besides the regular pay scale, he was entitled to consulting charges in respect of private cases. He was also expected to participate in teaching and taking clinics for the students of Dr.V.M.Medical College, Solapur. His services were to be governed by the rules and regulations applicable in the Hospital.

It appears that on 18th July 1987, the services of the Doctor were terminated without paying him retrenchment compensation or wages in lieu of notice. No enquiry was held against him prior to terminating his services. Aggrieved by this decision of the Hospital, the Doctor filed a Complaint of unfair labour practice being Complaint (ULP) No.212 of 1987. This Complaint was filed on 6th October 1987. In the Written Statement, the contention raised was that the services of the Doctor have been terminated in accordance with the Rules applicable. Paragraph 1 of the Written Statement reads thus :

> "1. That the complaint of the complainant is not a legal and the same is not maintainable under the provisions of M.R.T.U. AND P.U.L.P. Act. The Opponent has not committed any unfair labour practice in discharging the services of the applicant. Therefore, there is no unfair labour practice, and this court has no jurisdiction to entertain the complaint of the complainant (applicant)."

Besides this paragraph, there is no other averment made or contention raised regarding the maintainability of the Complaint. Nor is there any reason mentioned in the Written Statement as to why the Complaint is not maintainable.

5. Evidence of the Doctor and the Officer of the Hospital was led before the Labour Court. In the

evidence, the Doctor has denied that he was paid any share in the amount collected from the patients by way of consultation charges in the Outdoor Patient Department. However, he has admitted that some percentage was paid to the Doctor of a concerned Department for consultation charges collected from patients to whom a special room or family blocks were allotted. He was not tendered one month's notice pay prior to his termination of his service nor was he paid retrenchment compensation or notice wages in lieu thereof. However, he has admitted that from 18th July 1987 he has been practising privately. The Doctor did not disclose the income from his private practice nor did he disclose the number of his patients. However, he has stated that he was not an income tax payer. He has then deposed that he was working in Shahu Charitable Hospital since 1992 and was drawing a monthly salary of Rs.250/- per month. He was also getting 40% of the consultation charges. The evidence of the Hospital disclosed that the Hospital employed another Doctor in place of the Respondent Doctor after his services were terminated. The witness has stated that the Doctor has commenced private practice. However, the witness has also admitted the factual situation that no enquiry was held neither was any notice issued to him prior to terminating his services nor was any retrenchment compensation paid.

6. By the judgment and order dated 18th October 1983, the Labour Court, Solapur concluded that the workman was entitled to reinstatement with continuity of service and 50% of the back wages due. No issue regarding the maintainability of the Complaint has been framed, obviously because no case had been made out in the Written Statement that there was any doubt regarding the maintainability of the Complaint. Revision Applications were filed in the Industrial Court, Solapur by both the Hospital as well as Doctor challenging the order of the Labour Court. In the Revision Application filed by the Hospital, one of the grounds raised is that the judgment and order of the Labour Court, Solapur was not proper as the Complaint was not maintainable under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the "MRTU & PULP Act"). The other grounds taken in the Revision Application related to the merits of the case. Both the Revision Applications filed by the Hospital as well as the Doctor were dismissed by the Industrial Court.

7. Aggrieved by the orders of the Industrial Court, the present Petitions have been preferred before this Court. Mr.Godbole, learned Advocate for the Hospital, submits that the Labour Court and the Industrial Court

were both in error in deciding that the workman was entitled to reinstatement with continuity of service and 50% back wages when the Complaint itself was not maintainable. According to the learned Advocate, the Doctor was not covered by the definition of "workman" under Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as the "ID Act") and, therefore, both the Courts were in error in deciding that the Complaint was maintainable. He submits that the issue of jurisdiction can be raised at any stage in the proceeding and since the Hospital had raised the issue in the present Writ Petition, this Court under Article 226 of the Constitution of India ought to reject the Complaint. He relies on the judgment in the case of *Ahmedabad Municipal Corporation* vs. *Virendra Kumar Jayantibhai Patel*, **(1997) 6 SCC 650** to submit that the question of jurisdiction can be raised even as late as in the stage of execution proceedings and, therefore, this Court can entertain the present Writ Petition. He submits that the learned Single Judge of this Court in the case of *N.M.Wadia Charitable Hospital* vs. *Umakant Ramchandra Warerkar (Dr.)*, **1997 I CLR 240**, has held that Doctors similarly employed by the Hospital could not be considered to be workmen under Section 2(s) of the ID Act. He submits that there is no difference with the nature of work performed by Dr.Warerkar in the earlier Writ Petition and the Doctor in the present case and,

therefore, the Complaint was not maintainable. He further relies on the judgment of the Division Bench of this Court in the case of *A.Sundarambal* vs. *Government of Goa, Daman & Diu and others*, **1983 Mh.L.J. 881**, to submit that the workman was expected to work as a Doctor in the Hospital and, therefore, he could not be considered a workman. He submits that the judgment of the Division Bench of this Court referred to above has been confirmed by the Apex Court in the case of *Miss A.Sundarambal* vs. *Government of Goa, Daman & Diu and others*, **AIR 1988 SC 1700**. On merits, the learned Advocate submits that the Doctor was first offered notice wages inasmuch as he was asked to collect legal dues from the office while terminating his services. According to the learned Advocate, this is sufficient compliance of Section 25F of the Industrial Disputes Act, 1947 and, therefore, there was no unfair labour practice committed by the Hospital.

8. Ms.Buch, learned Advocate appearing for the Doctor, submits that the issue as to whether a person is a workman is a mixed question of law and fact and cannot be permitted to be raised at this belated stage. According to the learned Advocate, the Doctor had no reason to lead any evidence as to whether he fell within the definition of Section 2(s) of the ID Act and in these circumstances it was not proper to expect that

this Court under Articles 226 and 227 of the Constitution of India should interfere with the findings of the Labour Court and the Industrial Court. She places reliance on the judgment in the case of *Shankar Chakravarti* vs. *Britannia Biscuit Co. Ltd. and another*, **AIR 1979 SC 1652**, where the Supreme Court has held that although there may be sufficient evidence on record to decide an issue, unless that particular issue is pleaded, it cannot be raised at a belated stage. She then places reliance on the judgment of a learned Single Judge (Dr.D.Y.Chandrachud, J.) of this Court in the case of *Air India Limited* vs. *Mrs.Sashikala Jatav and another*, (**Writ Petition (Ldg.) No.2894 of 2004**) to submit that unless there is a pleading or contention raised in the pleadings regarding a particular fact, no amount of evidence can substantiate that fact.

9. Therefore, the first issue before me is whether the Hospital can be permitted to raise the issue as to whether the Doctor is a "workman" or not at this stage in the Writ Petition for the first time.

10. There is no dispute that there is no pleading whatsoever in the Written Statement that the Doctor is not a workman or that the Complaint was not maintainable because the Doctor was not a workman as defined under Section 2(s) of the ID Act. A bald statement has been

made in the Written Statement that the Complaint is not maintainable and no further contention has been raised in this respect. Even in the Revision Application filed by the Hospital, no such contention has been raised. The question whether a person is a workman or not is a mixed question of law and fact. Unless, the facts are pleaded and proved in the Court, the Labour Court or the Industrial Court, as the case may be, will not be able to arrive at any conclusion as to whether a person is a workman. Whether on the facts on record, the person falls within the definition of "workman" would be a question of law. In my view, such a question cannot be permitted to be raised in the Writ Petition for the first time. The Supreme Court in the case of *Shankar Chakravarti* (supra) has observed thus :-

> "30. ... The Labour Court or Tribunal would then proceed to decide the lis between the parties. It has to decide the lis on the evidence adduced before it. While it may not be hidebound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a lis between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the lis on any extraneous considerations. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court.
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> 31. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and

> when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in Tin Printers (Pvt.) Ltd. v. Industrial Tribunal (1967) 2 Lab.L.J 677 at p. 680 (Punj), commends to us. The rules if fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary.
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> 32. Can it for a moment be suggested that this elementary principle does not inform industrial adjudication ? The answer must be an emphatic ‘no’. "

11. In the present case, neither is the contention as to whether the Doctor is a workman been raised in the Written Statement nor has any complaint being made by

the Hospital that such an issue was not framed by the Labour Court while deciding the Complaint. In fact, this issue was not raised before the Industrial Court in Revision where the Hospital could have urged it. Even in the Revision Application, the only submission made is that the Complaint is not maintainable without showing any justification for that contention. Therefore, in my view, this issue cannot be permitted to be raised at this belated stage.

12. Mr.Godbole for the Hospital submits that since there is a judgment of this Court in the case of other Doctors employed by the Hospital, this Court should take a similar view. In the case of *N.M.Wadia Hospital* (supra), the learned Single Judge of this Court as he then was (Kapadia, J.) considered whether Dr.Warerkar, whose services were terminated, was a workman as defined under Section 2(s) of the ID Act. The Labour Court while adjudicating the Reference came to the conclusion that Dr.Warerkar was not performing work of a supervisory nature and, therefore, was a workman. The contention as to whether Dr.Warerkar was a workman or not had been specifically raised by the Hospital in the Written Statement. This Court on the basis of the material on record and the facts decided that Dr.Warerkar was not a workman as defined under Section

2(s) of the ID Act. The submission of Mr.Godbole that there is ample evidence on record to indicate that the work performed by the Doctor in the present case and Dr.Warerkar in the earlier case was identical also cannot be accepted. In my view, the basic difference is that whereas in the earlier case a specific contention had been raised regarding the status of Dr.Warerkar as a workman, no such contention was raised in the present Complaint. In my view, therefore, there is no need to go into this issue as to whether the Doctor is a workman or not.

13. In the case of *Air India* (supra), this Court considered whether the management in that case had produced any documentary evidence on record to establish the fact that there was delegation of powers by the person who was authorised to take a decision in the matter. This Court was of the view that an instrument of delegation of power must specifically mention the delegation of powers of disciplinary jurisdiction and non-production of such a document would mean that the disciplinary action had been taken unauthorisedly by the employer. The learned Single Judge has placed reliance on the judgment in *Hindustan Brown Boveri Ltd.* vs. *Their Workmen*, **1967 I LLJ 571 (SC)**, which has held that when the management is negligent in not producing any documents indicating that an officer had been authorised

to take any particular action against the workman, the company could not produce additional evidence when there was no mention before the Labour Court or even in the Special Leave Petition that there existed any delegation of authority.

14. In the case of *Air India Limited* vs. *Anil R. Joshi*, **2002 II CLR 943**, this Court was of the view that when a contention is not raised before the Tribunal nor in the Writ Petition, even if there is evidence in support of such contention, it cannot be examined because the otherside has no notice of it and if entertained it would tantamount to granting an unfair advantage to the party raising such a contention. Similarly, in the case of *Steel Authority of India Ltd.* vs. *Gujarat Mazdoor Panchayat and another*, *2004 II CLR 275*, documents were sought to be produced before the High Court while considering the Award of the Industrial Tribunal. These documents had not been produced earlier in the Reference. The Gujarat High Court held that it would not be justified in setting aside the Award of the Tribunal on the basis of these documents being sought to be produced for the first time in the Writ Petition as it was unfair to the Tribunal and it did not advance the cause of justice. The High Court has held that the party to the Writ Petition under Article 226 of the Constitution of India is not entitled to get an order of

remand to cover up deficiencies due to complete laches of that party. The Writ Petitioner cannot be allowed to fill in gaps and lacunae in the evidence which are due to omissions by it.

15. In the present case, the judgment of the Labour Court or the Industrial Court for that matter cannot be faulted for not considering the question as to whether the Doctor was a workman nor can such a point be raised for the first time as it would mean that the Doctor is put into a disadvantageous position as he had no notice that the Hospital would raise such an issue. Therefore, the evidence which was required to be led on merits, without the issue as to whether the person is a workman being framed, has been led by the Doctor. It is not possible to accept the submission made by Mr.Godbole that there is sufficient evidence on record to show that the Doctor was not a workman. Evidence cannot take the place of pleadings. When there are no pleadings on record disputing the Doctor’s status as a workman, no amount of evidence would advance the case of the Hospital. Furthermore, the question as to whether a person is a workman or not is not merely a question of jurisdiction, as contended by Mr.Godbole, which can be raised at any stage of the proceeding, but is a question of the status of the employee. The status of an employee must be established as a matter of fact in

order to ascertain whether he falls within the definition of Section 3(s) of the MRTU & PULP Act. That being so, the orders of the Labour Court and the Industrial Court cannot be interfered with for the reason that they have not considered whether the Doctor is a workman or not.

16. On merits, Mr.Godbole's submission that the services of the Doctor were terminated in accordance with the appointment letter also cannot be accepted. Once it is held that the Doctor is a workman, it would mean that there has to be compliance with the provisions of Section 25F of the ID Act prior to terminating his services. Admittedly, no retrenchment compensation was offered to the Doctor nor was any amount offered as wages in lieu of notice. The Doctor was informed to collect one month's wages from the office. The Labour Court has rightly come to the conclusion that this did not constitute an offer and the termination was, therefore, in breach of Section 25F of the ID Act.

17. As regards back wages payable, the Labour Court has found that the Doctor was entitled to 50% of the back wages since he had deposed that he was practising privately. The Labour Court has also taken into consideration the fact that the Doctor did not disclose his exact income from his private practice. However,

since the Labour Court was of the view that there was an unfair labour practice committed by the Hospital, the Labour Court has awarded 50% back wages taking into consideration the amount that he earned with Shahu Charitable Hospital and the amount that he would have earned from consultation charges. In my view, there is no need to interfere with this finding of the Labour Court which has been confirmed by the Revisional Court. The submission of Ms.Buch that the Hospital had not led any evidence to show that the Doctor was not entitled to full back wages cannot be accepted. The Doctor ought to have disclosed the exact amount that he was earning in private practice. Not having done so, the Labour Court has considered that 50% would be the appropriate amount to be awarded as back wages.

18. For the foregoing reasons, I do not see any reason to interfere with the findings of the Labour Court. Both the Writ Petitions are, therefore, dismissed. Rule discharged. No order as to costs.

19. Mr.Godbole seeks stay of this judgment for eight weeks. The operation of this judgment is stayed for eight weeks.

20. Office to issue authenticated copy of this judgment.